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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

NO. 159.

CHARLES T. BARNEY,

Appellant,

against

THE CITY OF NEW YORK, THE BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS FOR THE CITY OF NEW YORK and others,

Appellees.

BRIEF FOR APPELLEE JOHN B. McDONALD.

DELANCEY NICOLL,
PRATT A. BROWN,
Counsel for appellee McDONALD,
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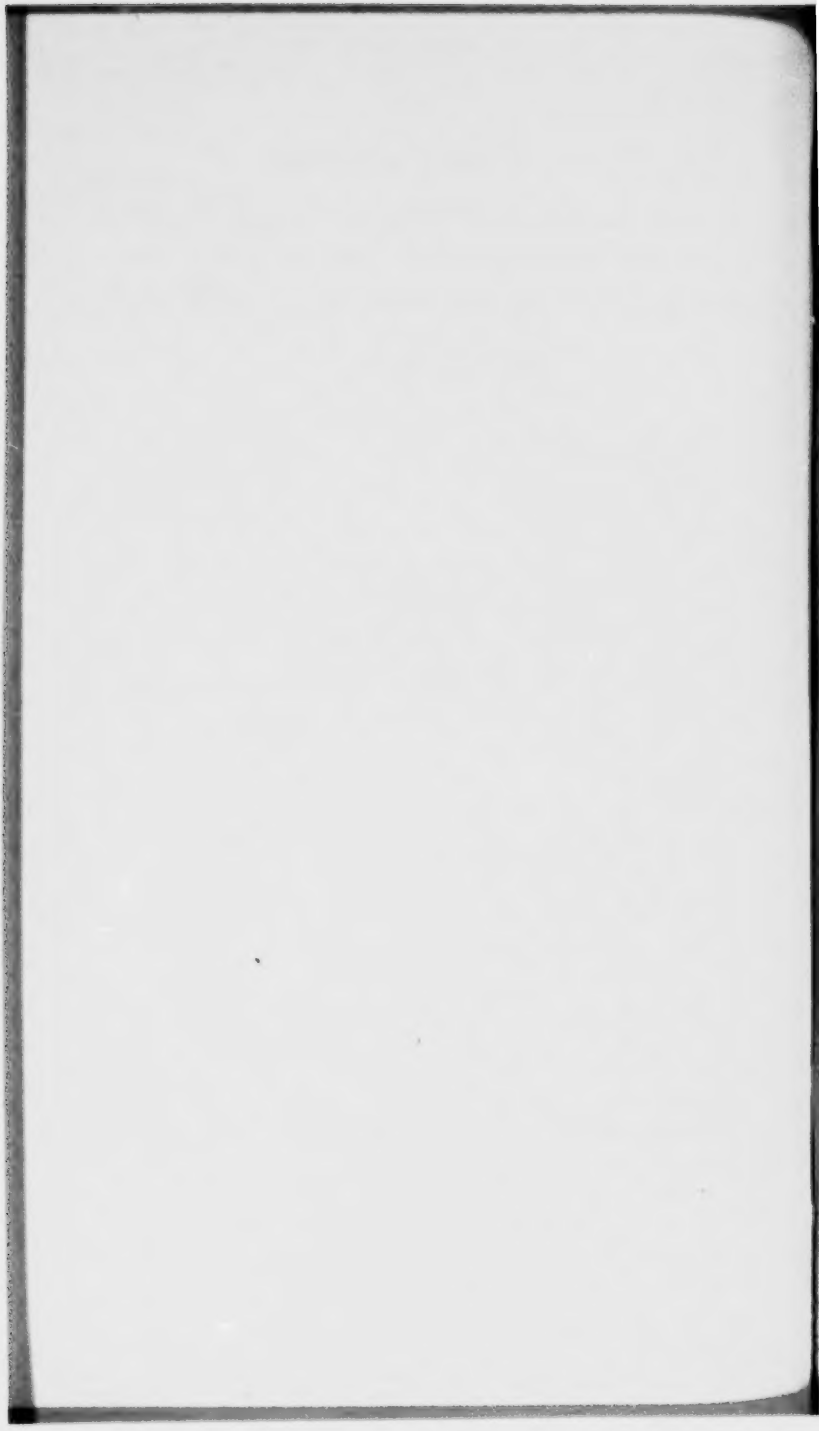

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Supreme Court of the United States.

CHARLES T. BARNEY,
Appellant,

AGAINST

THE CITY OF NEW YORK, BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS FOR THE CITY OF NEW YORK, SETH LOW, EDWARD M. GROUT, MORRIS K. JESSUP, ALEXANDER E. ORR, JOHN H. STARIN, WOODBURY LANGDON, CHARLES S. SMITH and JOHN CLAFLIN, as Commissioners of Rapid Transit, JOHN B. MCDONALD, MAY L. SHALER as Administratrix of the estate of Ira A. Shaler, deceased,
Appellees.

BRIEF FOR APPELLEE JOHN B. McDONALD.

Statement.

The bill of complaint begins with a correct description of the parties to this suit, from which it appears that Charles T. Barney, the complainant, is a private person; that the defendant The City of New York is a municipal corporation; that the defendant The Board of Rapid Transit Railroad Commissioners is a board organized and existing under and by virtue of the laws of the State of New York; that the defendants Seth Low,

Edward M. Grout, Morris K. Jessup, Alexander E. Orr, John H. Starin, Woodbury Langdon, Charles S. Smith and John Claflin are Commissioners of Rapid Transit, composing the said board; that the defendants John B. McDonald and May L. Shaler, are private persons (Transcript, p. 3).

The Board of Rapid Transit Railroad Commissioners for the City of New York, composed of the persons above named, was created, organized and exists under and by virtue of Chapter 4 of the Laws of 1891, commonly known as the Rapid Transit Act (*Id.*, p. 3).

The said board has no power, except such as is derived from the said act (*Id.*, pp. 3–4). Subsequent to the organization of the said board and pursuant to the terms of the said act, the said board took various proceedings relative to the adoption of the routes and general plan of construction of a proposed rapid transit railroad in the City of New York (*Id.*, pp. 4–8). Thereafter the City of New York, acting through the said board, entered into a contract for the construction of the said railroad with the defendant John B. McDonald (*Id.*, p. 8). In the said contract it was provided that the said railroad should be constructed according to certain drawings, which the complainant alleges were deviations from certain original drawings annexed to, and forming part of, the routes and general plan previously adopted by the said board (*Id.*, pp. 8–9).

Subsequent to the making of the contract aforesaid the said defendant McDonald entered into a sub-contract with one Ira A. Shaler, whereby the said Shaler agreed to construct that portion of the said railroad running from a point 100 feet northwardly from the centre of Thirty-third street to the centre of Forty-first street in Park avenue, in accordance with the provisions of said contract (*Id.*, p. 9). Thereafter said Shaler entered upon the land in Park avenue, between the streets aforesaid, and commenced blasting, excavating, &c.

(*Id.*, p. 9). On the 29th of June, 1902, the said Shaler died, and thereafter and prior to the beginning of this suit the defendant, May L. Shaler, was duly appointed administratrix of the estate of the said Ira A. Shaler, and has since been and now is acting as such administratrix (*Id.*, p. 4). The complainant alleges that the work of construction as now in progress in Park avenue aforesaid is not in accordance with the said routes and plan, but that two tunnels are being constructed, the easterly one of which runs upwards of twenty-seven feet to the east of the place where the same was to have been constructed according to the contract drawings aforesaid, bringing the easterly wall of said easterly tunnel within about seven feet of the house line of the easterly side of said Park avenue (*Id.*, p. 9). The complainant is the owner of premises situated on the northeast corner of Park avenue and Thirty-eighth street (*Id.*, p. 4), directly adjacent to the work aforesaid.

It is alleged that the said work is being done without any authority other than certain directions given by the engineer employed by the Board of Rapid Transit Commissioners and that the fact of the deviation aforesaid was not until recently even known to the said Board (*Id.*, p. 10).

It is further alleged that if the work is to be thus *unlawfully* continued, and if the railroad shall be allowed to be operated along said *illegal* and *unauthorized* route, it will constitute a nuisance to complainant's property, and *will greatly interfere with his various easements in said avenue and deprive him of the enjoyment thereof; and his buildings will be irreparably injured by the excavations made in said avenue in front of his said premises and by the vibrations caused by the operation of said road; that the risk of injury to complainant's premises has become greater than it would have been if the road had been constructed according to said routes and general plan and that the risk of damage after the rail-*

road shall have been put in operation by reason of vibration "and other objectionable results" is greatly increased; that such acts will greatly and irreparably injure said premises and have interfered and will interfere with the use and quiet enjoyment of the same and his other easements appurtenant thereto; that no steps have been taken to acquire said easements and that said unlawful construction has constituted and will constitute an appropriation thereof, without due process of law, contrary to the provisions of the fourteenth amendment of the Constitution.

An injunction is thereupon prayed for, restraining the defendants from further constructing said railroad adjacent to complainant's premises "*until the easements appurtenant thereto shall have been duly acquired according to law and due compensation therefor made to complainant.*"

Briefly the complainant's claim is this:

> He owns property abutting on Park avenue.
>
> The Board of Rapid Transit Railroad Commissioners had authority from the Legislature to lay out a route and build a railroad which should run through Park avenue.
>
> The Board laid out a route according to law and complainant consented to the construction of the railroad according thereto.
>
> The Board made a contract for the construction of the road along a route immaterially differing from that duly authorized.
>
> The Board had no authority from the Legislature to make any contract materially deviating from the duly adopted plan.
>
> The defendants McDonald and Shaler, without authority except from an employee of the Board, are constructing the road according to a materially different plan from that authorized by law.
>
> Such construction interferes with complain-

ant's easements in the street adjacent to his premises.

It is not alleged what easements are being interfered with.

The construction aforesaid increases the risk of damage to said premises from the excavation in the street and from vibration which may be caused by the operation of the road when completed.

The construction aforesaid is a nuisance.

The aforesaid interference with plaintiff's easements in the street is an appropriation thereof without due process of law, contrary to the provisions of the Constitution.

The complainant moved for a preliminary injunction and submitted papers amplifying the allegations of his bill. The motion was denied and, the complainant waiving the raising of the question of jurisdiction by plea, a final decree was made dismissing the bill for want of jurisdiction (see pp. 74–75).

The complainant appeals from such decree. The question of jurisdiction alone is certified, and that question alone can be considered upon this appeal.

McLish *v.* Roff, 141 U. S., 661.
Schunk *v.* Moline, M. & S. Co., 147 U. S., 500.

The rule by which the question of jurisdiction is to be determined is as follows:

> "It must appear on the record, by a statement in legal and logical form, such as is required by good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution, or some law or treaty of the United States, before jurisdiction can be maintained on this ground."
>
> Defiance Water Co. *v.* City of Defiance, not yet reported—Decided Nov. 30, 1908.

Citing

Western Union Tel. Co. *v.* Ann Arbor Ry. Co., 178 U. S., 239.

Gold Washing & Water Co. *v.* Keyes, 96 U. S., 199.

Blackburn *v.* Portland Gold Mining Co., 175 U. S., 571.

Shreveport *v.* Cole, 129 U. S., 36.

New Orleans *v.* Benjamin, 153 U. S., 411, 424.

Pursuant to this rule it must be inquired:

1. Does the record disclose any action on the part of the *State*.
2. Does the record show any taking of any *property* of the complainant.

We believe the decree appealed from should be affirmed for the following reasons:

FIRST POINT.

The record does not show any action on the part of the State.

The provision of the Constitution which the complainant invokes is "nor shall any *State* deprive any person of life, liberty or property without due process of law." This provision is a prohibition against improper action by a *State* and not against willfully erroneous or improper acts of State officers or private individuals. This proposition is elementary and requires no discussion.

Guthrie's Lectures on the Fourteenth Amendment, p. 72.

United States *v.* Cruikshank, 92 U. S., 542, 554.

Civil Rights Cases, 109 U. S., 3.

United States *v.* Harris, 106 U. S., 629, 638.

Following out this principle, this Court has held flatly that when the Legislature of a State has enacted laws which, if followed, will furnish citizens the necessary constitutional protection of life, liberty and property, the State has performed its constitutional duty, and that the Federal courts are without jurisdiction to entertain suits based upon infractions of such laws until after the State, through its courts, has denied the rights which the Constitution guarantees.

This principle was apparently first laid down in

Arrowsmith *v.* Harmoning, 118 U. S., 194.

There the plaintiff sought, in the Court of Common Pleas of Defiance County, Ohio, to recover property of which he alleged he had been deprived without due process of law. The property which he claimed was sold under the direction of a special guardian appointed by the Probate Court for the purpose of making a sale. The special guardian made such sale without giving any bond, as required by the law of Ohio. In all other respects the sale was regular and the interests of the plaintiff fully protected. The Court of Common Pleas denied him relief, the judgment thereof was confirmed by the District Court, and subsequently by the Supreme Court of Ohio, and from the Supreme Court of Ohio the case was taken upon writ of error to this Court, where the judgment was affirmed, and where the principle above stated was laid down.

Citing and following the case last above cited, Putnam, *C. J.*, in the case of

In re Storti, 109 Fed. Rep., 807 (aff'd 183 U. S., 141),

denied a writ of *habeas corpus* in behalf of a subject of the King of Italy, who was in jail in Massachusetts as the result of a judgment and sentence of the State court of Massachusetts finding him guilty of murder and directing his electrocution. The

Court held that the Fourteenth Amendment had no application to the case, saying, at page 809:

> "The first ground stated by them (petitioner's counsel) is the Fourteenth Amendment, that part of it which relates to due process, but the case shows beyond all question that the Legislature of Massachusetts has done its duty, and the only claim brought to our attention by the petition is that some one —the Attorney-General, the Warden of the State prison or somebody else, is not going to do his duty. Now, beginning with the case of Arrowsmith *v.* Harmoning, 118 U. S., 194, and following down through a long line of cases and also through a line of parallel cases raising the same question but in different forms, it is held that the Fourteenth Amendment does not apply where the fault is incidental, either with the courts or with the officials—therefore, so far as the Fourteenth Amendment is concerned it is clear we have no jurisdiction."

Carrying this principle still further, the case of

Kiernan *v.* Multnomah County, 85 Fed. Rep., 849,

is very much in point. That was a suit by a resident and citizen of the State of Oregon against the Sheriff of Multnomah County to restrain the collection of certain taxes for which the Sheriff had a warrant and under which he threatened to sell complainant's property for unpaid assessments. The substance of the complaint was that the tax and proceedings were not authorized by the law of the State in pursuance of which the Sheriff was acting, and that to permit the sale of the complainant's property in the manner threatened would be to take his property without due or any process of law, &c.

The Court, Bellinger, *J.*, in dismissing the bill of complaint, said, at page 849:

> "*The Fourteenth Amendment has reference exclusively to State action and not to any*

> *action by individuals.* It is a prohibition upon the State to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, or which shall deprive any person of life, liberty or property without due process of law. *It prohibits State legislation in violation of these rights. It does not refer to any action by private individuals—otherwise every invasion of the rights of one person by another would be cognizable in the Federal courts under this amendment. The question sought to be presented in this case relates to the interpretation to be given the law of the State, and the complaint is that this law is being misinterpreted and misapplied to the injury of the plaintiff in his rights of property. In all such cases, where there is not the requisite diverse citizenship and amount in controversy to give the Court jurisdiction, the remedy for the injuries complained of is in the State courts.*"

The deduction to be drawn from the cases above cited is clearly that where a State has done its part in providing a proper and due process of law, and its officers exceed the powers granted them by such proper provisions, recourse must be had primarily to the State courts to remedy any wrong done by such officers or to prevent any threatened injury by them, and that until such recourse is had and the State courts have denied relief, it cannot be said that the *State* has denied any one his constitutional rights.

In the case under consideration it is not contended that the building of the tunnel according to the duly adopted "routes and general plan" would have been unlawful in any respect. As the learned Judge below has pointed out (Transcript, p. 71), the Legislature carefully provided in the Rapid Transit Act (Chapter 4, Laws 1891) "for the various steps which make up what is understood to be 'due process of law,'" and if the "routes and general plan" had been strictly followed no one could have been heard to complain. The complainant's claim is, however, that there has been a deviation from the legally

authorized routes, and "that the act of the said board in permitting the defendants McDonald and the said Shaler to enter upon that part of Park avenue between Thirty-third and Forty-first streets where the tunnel is now in process of construction, as aforesaid, was illegal and unauthorized and the defendants McDonald and Shaler have entered upon the same unlawfully and without authority" (Transcript, p. 11).

In other words, it is claimed that the work as now in progress is being done in *violation* of the careful provisions of the statute, in *violation* of the authority thereby vested in the said board, and without any authority from the State whatsoever. It is not contended that these defendants have even attempted to interpret or apply the act of the Legislature; it is contended that they have *broken* the law of the State.

A case presenting precisely these features was very recently submitted to this Court and the question of jurisdiction was decided in the negative.

State of Missouri *v.* Dockery (not yet reported. Decided Nov. 16, 1903. Opinion by Mr. Justice Holmes).

In that case it was held flatly that *Federal courts will not entertain jurisdiction to prevent acts of State officers done without authority of or contrary to State law. That is for the State courts to remedy.*

In the appellant's brief it is said, at page 34: "It is clear that the Board of Rapid Transit in this case built the subway in Park avenue and took whatever action it did in that regard by virtue of the powers and rights derived from the Rapid Transit Act." But this is not the claim made in the bill of complaint, nor in any of the papers submitted in support thereof. As we have already pointed out, the claim disclosed in the record is that the proceedings in Park avenue were had, not in virtue of powers derived from the Rapid Transit Act, but in direct violation of its plain and specific provisions. The

appellant cannot now alter his position in this regard, but must stand or fall upon the statements contained in the record and not upon those contained in his counsel's ingenious argument.

Furthermore, in order to secure the relief to which he deems himself entitled, the complainant has made parties to this suit, and has asked that an injunction issue against, persons who are in no wise State agencies, and who cannot be said to represent the State in any respect whatsoever. The defendant McDonald is not an officer of the State. He is a contractor whose position in this suit is simply that of a person employed by the municipality to construct a public work, and as such he cannot be said in any respect to represent the State or to be a State agency. The defendant May L. Shaler is the administratrix of a deceased person who was a sub-contractor employed by the defendant McDonald to construct a portion of such public work. These defendants are simply private persons. Any grievance which the complainant may deem himself to have as against these persons, is a grievance of a private person against a private person, and it is impossible to conceive how he can bring them into a Federal court seeking relief on the ground that through them the *State* has deprived him of his property without due process of law.

We are aware that there are expressions in some of the books which at first glance may appear to support the complainant's position with respect to this question of jurisdiction, but we submit, and we believe that we will be able to show, that in not one of the cases in which such expressions have occurred, has a state of facts appeared sufficient to warrant the use of the case as an authority in opposition to the position which we occupy.

In

Virginia v. *Reeves, 100 U. S., 313,*

it is stated broadly that a State may exercise her authority through different agencies, and the prohi-

bitions of the Fourteenth Amendment to the Constitution extend to her action denying equal protection of the laws, whether it be by one of the agencies or by another. This would seem to be in conflict with the authorities above quoted, but in reality it is not. The opinion and the dicta therein contained must of course be read with respect to the facts appearing in the case itself, and when that is done it will appear that the case actually supports the defendants' position. This was an application to this Court *for a writ of mandamus* directing the Judge of the United States District Court of the Western District of Virginia to cause to be redelivered by the Marshal of the District to the jailor of Patrick County, the bodies of two persons then in custody of the said marshal. It appeared that the two persons in custody had been indicted for murder in the County Court of Patrick County, Virginia. The case having been removed into the Circuit Court of the State and brought on for trial, the defendants moved that the *venire*, which was composed entirely of the white race, be modified so as to allow one-third thereof to be composed of colored men. This motion was overruled. Thereupon the defendants before trial filed their petition, duly verified, praying for a removal of the case into the United States Circuit Court on the ground that the petitioners were denied their equal civil rights, in that they were not allowed to have a portion of the jury by which they were to be tried, composed of competent jurors of their own race and color. Their petition was denied, the trial was proceeded with, and the defendants were convicted. The verdicts and judgment, however, were set aside and a motion for the removal of the case was renewed and again denied. The defendants were then tried again separately, one being convicted and sentenced and the jury disagreeing in the other case. A writ of *habeas corpus* was then issued out of the Circuit Court of the United States, by virtue of

which the defendants were taken out of the jail of Patrick County into the custody of the United States marshal, the writ having been granted upon the record of the State court. The State of Virginia then brought this proceeding in the Supreme Court. It appeared that the laws of the State of Virginia were entirely proper with respect to the selection of juries, and the Supreme Court in granting the writ of mandamus said, at page 321:

> "*But when a subordinate officer of the State, in violation of State law, undertakes to deprive an accused party of a right which the Statute law accords to him, as in the case at bar, it can hardly be said that he is denied or cannot enforce in the judicial tribunals of the State the rights which belong to him. In such a case it ought to be presumed the Court will redress the wrong.* If the accused is deprived of the right the final and practical denial will be in the judicial tribunal which tries the case after the trial is commenced. If, as in this case, the subordinate officer whose duty it is to select juries fails to discharge that duty in the full spirit of the law; if he excludes all colored men solely because they are colored; or if the sheriff to whom a *venire* is given composed of both white and colored citizens neglects to summon the colored jurors only because they are colored; or if a clerk whose duty it is to take the twelve names from the box rejects all the colored jurors for the same reason, it can with no propriety be said the defendant's right is denied by the State, and cannot be enforced in the judicial tribunals."

Thus it appears that this case is in realty a flat and very strong authority in favor of the defendant's position, and it is very instructive in that it furnishes the line of distinction between it and other cases which may appear to hold to the contrary. The whole theory of the case and of the other cases above cited, is that the violation of State law by a State officer not a judicial officer, which results in

the deprivation of life, liberty or property without due process of law, is not such a deprivation by the State itself, and that until the State courts have denied redress the State cannot be said to have acted, and the powers of the Federal courts cannot properly be invoked.

See also

Gibson *v.* Mississippi, 162 U. S., 565;
Neil *v.* Delaware, 103 U. S., 370;
State of Missouri *v.* Dockery, *supra.*

Bearing in mind the authorities above cited, the distinction between cases appearing to hold to the contrary and the case at bar is easily discernible.

Ex parte Virginia, 100 U. S., 339,

was a criminal prosecution based upon Section 4 of the Act of Congress of March 1, 1875, against one J. D. Coles, Judge of the County Court of Pittsylvania County, Virginia, in which the said Coles was charged with having excluded from juries colored persons on account of their color, and for no other reason. Having been arrested, a petition for a writ of *habeas corpus* was presented to the Supreme Court, which held that the act under which the indictment was found was constitutional, entirely on the theory that he *as a judicial officer* was committing the State to a denial of equal protection of the laws and was, therefore, subject to prosecution under the said act. It will be observed clearly that in this case it was *judicial action* which was complained of and which was said to be the action of the State.

Yick Wo v. *Hopkins, 118 U. S., 356,*

was a case involving the constitutionality of an ordinance of the City of San Francisco, a *legislative act.*

Chi., Bur. & Q. R. R. v. *Chicago, 166 U. S., 226,*

was a writ of error to the Supreme Court of the State of Illinois, and the decision of the United

States Supreme Court was based upon the taking of property without due process of law *through the courts of the State of Illinois.*

In

N. C. & St. L. Ry. v. *Taylor, 86 Fed. Rep., 168,*

the acts of tax equalizers were complained of, but the decision turned upon the impropriety of the *statute* under which the equalizers assumed to act. The Court criticized the statute and held that it was unconstitutional, in that it purported to permit improper acts on the part of the subordinate officers charged with carrying out its provisions.

In

Iron Mountain Co. v. Memphis, 96 Fed. Rep., 113,

the State action complained of was a resolution of a city council, which was about to be followed by the forcible taking of property by the police of the city. This was *legislative action,* taken pursuant to *general powers* delegated by the State legislature, and the Federal courts, therefore, properly entertained the suit to restrain it.

Blake v. *McClung, 172 U. S., 239,*

was a writ of error to the Supreme Court of Tennessee, and the dispute was really over the provisions of a *State statute.*

Scott v. *McNeil, 154 U. S., 45,*

was a writ of error to the Supreme Court of the State of Washington, and the act complained of was the appointment of an administrator of the estate of a living person by a court of probate. Relief was first asked in the State courts, and, having been denied, it was properly granted in the United States Court, and besides the original act complained of was a *judicial act.*

In

Riverside & A. Ry. Co. *v.* City of Riverside, 118 Fed., 736,

and

Vicksburg Water Works Co. *v.* City of Vicksburg, 185 U. S., 65,

the action complained of was action by a municipal legislature.

In

Bancroft *v.* The County Commissioners, 121 Fed., 874,

the act complained of was the taxing of property by commissioners to whom the State had directly delegated the power to tax.

Spring Valley Water Works Co. *v.* San Francisco, 124 Fed., 574,

involved the improper exercise of a power to fix rates to be paid for water supply, directly delegated to local authorities by the Legislature.

In

Missouri Pacific Ry. v. *Nebraska, 164 U. S., 403,*

cited by the appellant, the difficulty was with a *statute*, as construed by the Court of last resort of the State. At page 414, the Court, per Mr. Justice Gray, said:

> " The Supreme Court of Nebraska has construed this statute as authorizing the board of transportation to make the order questioned in this case."

The order was, therefore, properly held to be an act of the State. The case cannot possibly fit the case of a violation of State law by its officers.

In

Reagan v. *Farmers' Loan & Trust Co., 154 U. S., 362,*

it appeared that the Legislature of the State of Texas had established a railroad commission and given to

it power to fix reasonable rates. The commission was given a broad discretion to determine what was reasonable. The act provided that the commission might be sued by individuals "in a court of competent jurisdiction in Travis County, Texas." *A citizen of another State* brought the action in a district which embraced Travis County. The Court, per Mr. Justice Brewer, at page 392, found in the provisions of the statute itself, authorization for the bringing of the action in the Federal Court. The question as to whether State action was being challenged was nowhere raised in the case. The Court found the jurisdiction of the Federal Court to lie in the diversity of citizenship and in the provisions of the statute as aforesaid. The citation of this case by the appellant appears to us, therefore, disingenuous.

Pacific Gas Imp. Co. v. *Ellert, 64 Fed. Rep., 421,*

is somewhat more nearly in point than the other cases cited by appellant's counsel, but it, too, is far wide of the mark. There a public board was given power to improve streets. The statute creating the board contained no specific delegation of power to *open* new streets. The board proceeded to lay out a new street, *not in direct violation of its powers, but merely in excess of them.* This was held to be State action. In the case now under consideration the claim is entirely different. It is claimed that the defendants are *violating plain provisions of the State law*, and not only exceeding their powers, *but actually acting in opposition to express prohibitions.* The case falls then, not within the rule applied in *Pacific Gas Imp. Co.* v. *Ellert*, but entirely within that laid down in *State of Missouri* v. *Dockery, supra.*

We confidently assert that there is not a case in the books which may fairly be regarded as an authority opposed to the position which we occupy.

SECOND POINT.

The record does not disclose that complainant has been or will be deprived of any property.

The complainant does not claim to own the fee of any part of the street in which the railroad complained of is being constructed. His claim is that "the risk of injury to his said residence, owing to the work of construction, has become much greater than it would have been had the work been done according to the 'routes and general plan' adopted by the board as aforesaid, and the risk of damage after the railroad shall have been put in operation by reason of the vibration caused by trains or by other objectionable results is in like manner greatly increased; and that such acts will greatly and irreparably injure and damage your orator's said premises, and will interfere with and interrupt, and have already interfered with and interrupted, the lawful use and quite enjoyment of the same and his other easements appurtenant thereto; *that no steps have been taken to acquire said easements; that said unlawful construction has constituted and will constitute an appropriation of the same, and* for the damages he will sustain he has no adequate remedy at law" (Transcript p. 11).

His prayer for relief is "that the defendants * * * be enjoined * * * from further constructing * * * a rapid transit railroad tunnel, or the operation of a railroad therein, under Park avenue adjacent to complainant's said premises, *until the easements appurtenant thereto shall have been duly acquired according to law and due compensation therefor made to complainant.*"

In other words, he claims (1) that he is being and will be deprived of easements in the street, and (2) that his property adjacent thereto stands in risk of

injury from noise, vibration, &c., when the railroad shall have been put into operation.

The complainant has not ventured to give a name to any easement of which he claims to have been deprived, nor has he attempted to show the extent to which, if at all, the same has been or will be interfered with, nor the manner in which such interference has been or will be accomplished. Indeed, it is impossible for him to do so for the reason that no such easement exists.

It is to be remembered that the structure complained of is a *tunnel under the surface of the street which has not involved and will not involve any disturbance of the surface.*

The Court of Appeals, in the elevated railroad cases, has definitely fixed the property rights of an abutting owner in a New York City street. It has been held that he has actual easements of *light, air and access*, for which compensation must be made if they are appropriated even for a great public utility.

Story *v.* N. Y. El. Ry. Co., 90 N. Y., 122.

It is obvious, however, that none of these rights in the complainant has been or will be interferred with. It cannot be imagined that the light of his house is the light of the nether world; that its air is not the air of heaven; nor that even in his hours of severest aberration he seeks access to his dwelling through any avenue with which a tunnel deeply underground will interfere. What property, then, are we taking from him? The Court of Appeals say *none*. They say that they stretched the law to the very breaking point in establishing the easements of light, air and access, and they have steadfastly declined to stretch it any further. In language clear and unmistakable they have laid it down that an abutting owner has no easement of quiet, none of freedom from vibration, none of privacy, and none of any sort save only those of *light, air and access.*

The following authorities leave no room for doubt on this point:

Am. Bk. Note Co. *v.* N. Y. E. R. R. Co., 129 N. Y., 252.

This case was the ordinary elevated railroad case, *i. e.*, an action for an injunction or in lieu thereof compensation for easements taken and damage suffered. The Court below made an award for *fee* damage, a portion of which was specifically stated to be in compensation for damage suffered from *noise*.

The Court, Finch, *J.*, following the former N. Y. cases, held that for property taken compensation must be made. Reference was made to the constitutional provision against the taking of property without due process of law. It was held that *easements* taken were *property* taken, and the Court then proceeded to enquire whether the making of noise constituted the taking of an easement. At page 271 the Court said:

> "What the elevated roads take from the abutter are his easements of *light, air and access.* * * * Now, the elevated roads take no land from the abutter. They stand wholly upon the land owned by the municipality, and no consequential damages flowing from the lawful corporate user could be recovered but from the fact that some of them, though not all of them, have been by the Story case transformed from consequential injuries into invasions of property rights. To the extent of that transformation the rule of damages must feel the effects of the change, but beyond that the further consequential injuries have not lost or changed their character, and to allow them as elements of compensation is to transform them also into invasions of property, and add a new brood of easements to those already awarded to the abutter, instead of leaving them, where the Story case left them, the mere incidents of a lawful use. In the Drucker case the full extent of the transformation bringing with it

> the liability for damages was sketched in these words: 'Smoke and gases, ashes and cinders affect and impair the easement of air; the structure itself and the passage of cars lessen the easement of light; the drippings of oil and water and possibly the frequent columns interfere with the convenience of access'; but there is no hint of any allowable recovery beyond what *pro tanto* constituted some elements of the taking. In the Lahr case, Ruger, *Ch. J.*, was equally guarded, saying that the incidental injuries could be recovered 'provided the evidence established the fact that they were destructive of the easements of light, air and access,' and these careful expressions were used although neither case involved a question of fee damages. I am averse to adding to the abutter's easements by changing their name and doing indirectly what I am sure none of us would do directly."

The cases cited by Justice Finch in the extract above quoted are

Story *v.* N. Y. El. Ry. Co., 90 N. Y., 122.

Lahr *v.* Met. E. R. Co., 104 N. Y., 268.

Drucker *v.* Man. R. Co., 106 N. Y., 157.

Bischoff *v.* N. Y. E. R. R. Co., 138 N. Y., 257:

In this case the subject as to whether plaintiff had any easements of privacy or quiet was discussed. Andrews, *Ch. J.*, at page 262, said:

> "*The property rights of an abutting owner consist of easements of light, air and access. There are no easements of privacy or quiet, or other easements than those mentioned, for which compensation can be claimed.*"

Messenger *v.* M. R. Co., 129 N. Y., 502:

Here it was held that an abutting owner has no easement of quiet or privacy, nor any easement which entitles him to the use of a street for the pur-

pose of having the exterior of his premises conspicuously visible from the other side of the street.

Noise, vibration, invasion of privacy and the like, have been held to be elements of damage in the elevated railroad cases, to be sure, but never on the theory that property was thereby taken or property rights thereby invaded. In such instances the relief has always been granted by way of compensation for *past damages* and on the theory that until the actual acquisition of the easements of light, air and access, the elevated roads were trespassers upon them and therefore liable for all the consequential damages flowing from the trespass. This is made perfectly clear in

Am. Bk. Note Co. *v.* N. Y. E. R. Co., 129 N. Y., 252.

There Finch, *J.*, at page 269, said:

> "We have already decided that in an action at law for the wrong done to abutters and in which past damages only are sought, the elevated roads are liable for the noise of their trains, upon the ground that they are trespassers and responsible for all injuries resultant from their wrongful act."

In Moore v. N. Y. E. R. R. Co., 130 N. Y., 523, Bradley, *J.*, at p. 527, said:

> "It seems well established that the theory upon which an action at law may be supported by an abutting owner against the defendant is, that they are in such sense trespassers or wrongdoers as to be liable to such owners for all the injuries resulting proximately from the wrongful act of maintaining and operating their elevated road (Lahr *v.* M. E. R. Co., 104 N. Y., 269; Drucker *v.* M. R. Co., 106 *Id.*, 157; Kane *v.* V. N. Y. E. R. Co., 125 *Id.*, 164, 186). In the latter case and in the more recent one of American Bank Note Co. *v.* N. Y. E. R. Co. & M. Ry. Co. (129 N. Y., 252), it was held that *while such relation of trespasser continued* the defendants were

liable to the abutting owner for the damages occasioned to him by the noise of operating the roads."

See cases cited in the extract quoted and also

Sperb *v.* M. E. R. Co., 137 N. Y., 155.

Bischoff *v.* N. Y. E. R. R. Co., 138 N. Y., 257.

Messenger *v.* M. R. Co., 129 N. Y., 502.

The cases cited undoubtedly expose sound law, but even if they did not, this court would not attempt to interfere with the decisions of the court of last resort of the State of New York with respect to what constitutes property, or what, under the laws of that State constitutes "a taking, an injury, or a destruction thereof."

Marchant *v.* Penn. R. R., 153 U. S., 380, 385.

Since the complainant has been deprived of no easement, and since he does not own the fee of any part of the street, there has been no taking of property from him through the mere addition of another burden to the uses to which the street has formerly been put.

Meyer *v.* The City of Richmond, 172 U. S., 82:

This case carefully reviews the authorities on this question, and sets at rest any doubt there may have been concerning it.

See also

Gibson *v.* The United States, 166 U. S., 269.

Eldridge *v.* Trezevant, 160 U. S., 452, 468.

Guthrie on the 14th Amendment, page 94.

There is nothing left, then, of the complainant's claim except his fear of damage to his property

abutting on the street, through the operation of the road. He does not claim that this amounts to, or will amount to, a taking of his property, and indeed the law declares that it will not.

In 1881 the Pennsylvania Railroad built an elevated structure for the support of its tracks through a street in Philadelphia. Such structure directly interfered with the access of one Miller to his premises abutting upon the street. It did not interfere with the access of one Marchant to his premises situated on the opposite side of the street, but damaged said premises through the noise, smoke and dust which the operation of the railroad produced. Miller was allowed to recover in the State courts of Pennsylvania, and, the case having been taken to this Court by writ of error, the judgment was affirmed. Marchant sued in the State courts and failed to recover. He obtained a writ of error to this Court claiming that he had been deprived of his property without due process of law, and this Court again affirmed the judgment of the State courts.

> Pennsylvania R. R. Co. *v.* Miller, 132 U. S., 75.
>
> Marchant *v.* Pennsylvania R. R. Co., 153 U. S., 380.

In the Marchant case the Court, per Mr. Justice Shiras, at page 389, in contrasting a series of cases similar to the Miller case with that under discussion, said:

> "The two classes of complainants differed in the critical particular that one class suffered direct and immediate damage from the construction of the railroad in such a way as to exclude them from the use of their accustomed highway, and the other class suffered damages which were consequential on the use by the defendant company of their franchise on their own property."

In other words, while it is a taking of property to deprive a man of access to his land, it is not a taking

of property to inflict injury upon his premises as a consequence of the use of other premises. Such injury may amount to actionable wrong, but if so, the remedy lies in the State Courts in the ordinary action to abate, or to recover damages sustained through, the maintenance of a nuisance, and not in the Federal Courts on the theory that every actionable damage to property amounts to a taking of property.

It seems clear, then, that the record does not disclose any *State action, nor any taking of property.*

THIRD POINT.

The decree should be affirmed.

Respectfully submitted,

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